UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FILED
MAR 10 2010
CLERK. U.S. DISTRICT COURT
NORFOLK. VA

DIGITAL-VENDING SERVICES INTERNATIONAL, LLC,

Plaintiff,

v. **Civil Action No. 2:09cv555**

THE UNIVERSITY OF PHOENIX INC. et al.,

Defendants.

ORDER

This matter is before the court on defendants' motions for judgment on the pleadings.[1] The complaint in the instant patent infringement suit alleges that defendants have infringed, and continue to infringe, on three of plaintiff's patents. The motions for judgment and supporting memoranda allege that certain claims in the patents are indefinite as a matter of law and that judgment of invalidity for indefiniteness should be entered on such claims. See IPXL Holdings, LLC v. Amazon.com, 430 F.3d 1377, 1384 (Fed. Cir. 2005) (holding that a single patent claim is indefinite when it covers both an apparatus and a method for using such apparatus). Plaintiff's memorandum in opposition to the motions argues that: (1) defendants' motions are premature; and (2) the challenged patent claims do not impermissibly mix classes of patentable subject matter as an apparatus claim is not indefinite merely because it uses functional language to describe the covered apparatus. See Microprocessor Enhancement Corp. v. Texas Instruments

[1] Defendants have filed two motions for judgment on the pleadings (Dkt. Nos. 144, 153), each seeking the same relief.

Inc., 520 F.3d 1367, 1375 (Fed. Cir. 2008) (distinguishing IPXL and reversing the district court's finding of indefiniteness because functional language was permissibly used in the apparatus claim at issue to provide a description of certain claimed features of the apparatus–it was not directed to the use of such apparatus).

The court has carefully reviewed the arguments presented by the parties, and although defendants' allegations of indefiniteness present a question of law, the court is wary to address such matter in this case prior to conducting claim construction. A determination of whether a claim is definite is based on "the court's performance of its duty as the construer of patent claims." Personalized Media Communications, LLC v. International Trade Comm'n, 161 F.3d 696, 705 (Fed. Cir. 1998). District courts typically address indefiniteness claims on summary judgment contemporaneous with, or subsequent to, claim construction when the court is far more familiar with the general subject matter of the patents as well as the specific language of the patent claims. See, e.g., IPXL Holdings, L.L.C. v. Amazon.Com, Inc., 333 F. Supp. 2d 513, 543 (E.D. Va. 2004). Although plaintiff points to one case where a district court found that claim construction did not impact the determination of indefiniteness, the motion before the court in such case was a motion for summary judgment, not a motion for judgment on the pleadings. Intellect Wireless, Inc. v. Kyocera Communications, Inc., No. 08 C 1350, 2009 WL 3259996, at *3 (N.D. Ill. Oct. 8, 2009) (unpublished). Furthermore, the district court in Intellect Wireless expressly recognized that indefiniteness claims are usually addressed "either after or concurrently with the claim construction phase of the litigation," but found that claim construction is not "a prerequisite" to resolving an indefiniteness claim. Id. The court therefore reached the merits of, and denied, the motion for partial summary judgment alleging that the claims at issue were indefinite. Id.

Here, at this early stage in the litigation, the court is largely unfamiliar with the patents at issue and has not even received the parties' claim construction briefs. The court therefore deems it imprudent to engage in the careful line drawing necessary to distinguish the impermissible mixture of classes of subject matter in a single claim, as was the case in IPXL, from the permissible use of method language in an apparatus claim, as was the case in Microprocessor Enhancement. The court therefore **DEFERS** issuing a ruling on the two motions for judgment on the pleadings.

The Clerk is **REQUESTED** to send a copy of this Order to counsel of record for all parties.

It is so **ORDERED.**

/s/

Jerome B. Friedman
UNITED STATES DISTRICT JUDGE

Norfolk, Va.
March 10, 2010